before Vohrah J. and the consent order of the Senior Assistant Registrar as one consent judgment or order, I rejected that submission because the judgment and order in the former action were made on two different and separate occasions by a judge and a judicial officer respectively. With respect I think Mr. Tan probably overlooked the fact that the judgment obtained before Vohrah J. in the former action was a judgment by default and not a consent judgment when he first addressed the court. When he finally replied to the submission of Mr. Sri Kumar and referred to the judgment of Ong J. in *Kok Hoong* v. *Leong Cheong Kweng Mines Limited*[19] he, with respect, overlooked the fact that that judgment of His Lordship was overruled by the former Court of Appeal ([1962] M.L.J. 224), and on further appeal to the Privy Council, their Lordships dismissed the appeal and held that the decision of the former Court of Appeal was correct. The short answer therefore to the first and second contention of Mr. Tan on behalf of the defendant is to be found in that Privy Council's judgment in *Kok Hoong* v. *Leong Cheong Kweng Mines Limited*[12] that default judgments though capable of giving rise to estoppels must always be scrutinized with extreme particularity for the purpose of ascertaining the bare essence of what they must necessarily have decided and they can estop only for what must necessarily and with complete precision have been thereby determined. In the former action, the plaintiff merely entered an appearance and did not take any further steps in the proceedings before the default judgment was obtained before Vohrah J. It cannot therefore be said that by that default judgment the Court has in the former action adjudicated upon any of the issues now raised by the plaintiff who is thereby estopped from raising them in the present action. This is, I think, one of the "special cases" which the learned Vice-Chancellor in *Henderson* v. *Henderson*[3] and Wan Suleiman J. (as he then was) in *Othman* v. *Mek*[2] had in mind. As I did not in all the circumstances of this case consider that the plaintiff's claim was frivolous, vexatious and an abuse of the court's process, I therefore declined at this stage to exercise the summary but nevertheless drastic powers of the court under Order 18 rule 19 Rules of the High Court, 1980, to order that the plaintiff's action be now dismissed.

*Application dismissed.*

Solicitors: *Sri Ram, Zulkifly & Kumar; Sothi & Ang.*

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## SENG HUAT HANG SDN. BHD. & ORS. v. CHEE SENG & CO. SDN. BHD.

**[O.C.J. (Edgar Joseph Jr. J.) December 3 & 4, 1985]**

**[Penang – Suit No. 1398 of 1985]**

*Practice and Procedure – Application to strike out Writ of Summons and Indorsement of Claim – Allegation of fraud in previous proceedings – Estoppel.*

In this case the defendant applied to strike out a writ of Summons and Indorsement of Claim as, *inter alia*, being frivolous, vexatious and an abuse of the process of the Court. The main argument of the defendant is that the plaintiffs' claim is barred by estoppel which arises from eight possession orders made in Civil Actions Nos. 1051, 972 to 978 all of 1978 in which the present defendant was the plaintiff and the present plaintiffs were the defendants. The plaintiffs, however, claimed, *inter alia*, for a declaration that the possession orders are null and void and as having been procured by a fraudulent misrepresentation of a material fact namely non-disclosure of the fact that the defendant had no title to sue for possession.

**Held**, granting the application: (1) the jurisdiction to strike out a Writ of Summons and Indorsement of Claim as being, *inter alia*, vexatious, frivolous and an abuse of the process of Court, ought to be very sparingly exercised and only in cases when it is obvious that the claim is devoid of all merit or cannot possibly succeed;

(2) there is no fraud on the part of the defendant. Even if there was fraud, the fraud was discoverable and could have been exposed by the present plaintiffs in the previous proceedings;

(3) the plaintiffs are bound by their pleadings in the previous proceedings and are thereby estopped from raising the point in the present action;

(4) in the present case the plaintiffs' claim is devoid of merit and it could not possibly succeed.

*Cases referred to:*

(1) *Wright* v. *Prescot Urban District Council* (1916) 115 L.T. 772.
(2) *Ee Kim Kin* v. *Collector of Land Revenue, Alor Gajah* [1967] 2 M.L.J. 89, 90.
(3) *Cooke* v. *Loxley* (1792) 5 Term. Rep. 4; 101 E.R. 2.
(4) *Cuthbertson* v. *Irving* (1859) 4 H & N 742 affirmed; (1860) 6 H & N 135; 158 E.R. 56.
(5) *Duke* v. *Ashby* (1862) 7 H & N 600; 158 E.R. 6, 10.
(6) *Weeks* v. *Birch* (1893) 69 L.T. 759.
(7) *Panton* v. *Jones* (1813) 3 Camp. 372 (per Baley J. @ 373); 170 E.R. 1415.
(8) *Cooper* v. *Blandy* (1834) 1 Bing. N.C. 45 (per Bosanquet, J. p.52); 131 E.R. 1034, 1037.
(9) *Seng Huat Hang Sdn. Bhd. & Ors.* v. *Chee Seng & Co. Sdn. Bhd.* [1986] 1 M.L.J. 348.
(10) *Lawrance* v. *Lord Norreys* [1890] A.C. 210, 219.
(11) *Willis* v. *Earl Beauchamp* (1886) 11 P.D. 59.
(12) *Duches of Kingston's Case* (1776) 2 Smith L.C. (13th ed.) 644, 651.
(13) *Jonesco* v. *Beard* [1930] A.C. 298 H.L. @ 301.
(14) *Price* v. *Stone* [1964] V.R. 106.

(15) *Patch* v. *Ward* (1867) 3 Ch. App. 203.
(16) *Giffen* v. *Leggatt* (1902) 2 N.Z.L.R. 427.
(17) *Birch* v. *Birch* [1902] P. 130.
(18) *Flower* v. *Lloyd* (1878-79) 10 Ch. D. 327.
(19) *Mcharg* v. *Woods Radio Pty. Ltd.* [1948] V.L.R. 496.
(20) *Kok Hoong* v. *Leong Cheong Kweng Mines Ltd.* [1964] M.L.J. 49.
(21) *Ker* v. *Williams* (1885) 29 Sol. J. 681.
(22) *Humphries* v. *Humphries* [1910] 2 K.B. 531
(23) *Yat Tung Investment Co. Ltd.* v. *Dao Heng Bank Ltd.* [1975] A.C. 581.
(24) *Fatimah* v. *Moideen Kutty* [1969] 1 M.L.J. 72.
(25) *National Westminster Bank Ltd.* v. *Hart* [1983] 2 All E.R. 177.
(26) *Industrial Properties* v. *AEI Ltd.* [1977] 2 All E.R. 293.

CIVIL SUIT.

*R. Rajasingam* for the plaintiffs.

*S.P. Annamalai* for the defendant.

*Cur. Adv. Vult.*

**Edgar Joseph Jr. J.** : This was a defendant's application to strike out a Writ of Summons, and Indorsement of Claim as, *inter alia*, being frivolous, vexatious and an abuse of the process of the Court. More particularly, the defendant argues that the plaintiffs' claim is barred by estoppel which arises from eight possession orders made in Civil Actions Nos: 1051, 972 to 978 all of 1978, in the Magistrate's Court, Georgetown, in which the present defendant was the plaintiff and the present plaintiffs were the defendant ("the Magistrate's Court Actions").

On the other hand, the plaintiffs' claim in the action herein is, *inter alia*, for a declaration that the possession orders made in the Magistrate's Court Actions are null and void having been procured by fraudulent misrepresentation of a material fact, namely, non-disclosure of the fact that the defendant had no title to sue for possession.

Before I embark upon a consideration of the merits of this application there is preliminary point (not raised before me) which calls for consideration.

I note that the application was made before service of the Statement of Claim. However, I can see no objection to it on this score, as it prays, *inter alia*, for the striking out of the Indorsement of the Writ in the Action as being scandalous, frivolous or vexatious – a matter which is expressly authorised by Order 18 rule 19(1) of the Rules of the High Court, 1980, the terms of which are as follows:

"The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –

(a) .....
(b) it is scandalous, frivolous or vexatious; or
(c) .....
(d) .....

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

I have considered the case of *Wright* v. *Prescot Urban District Council,*[1] which is said to be authority for the proposition that where it is sought to stay or dismiss an action, the application should not be made before the service of the statement of claim. But, a reading of the judgment of Neville, J. in that case shows that the decision therein was based on a very differently worded rule. The following passage from his Lordship's judgment at page 773, column 2 will make the point clear:

".....The matter does not stop there, because hitherto I have been dealing only with the inherent jurisdiction that every court must have over proceedings that are taken in it, but by a special order, Order XXV., r.4, "The court or a judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the court or a judge may order the action to be stayed or dismissed.".

Therefore, if when the *pleadings* are delivered the other side think that they disclose no cause of action, or no defence to the action at law, the court may strike them out if it comes to the same conclusion, and if the result of the investigation shows that no other *pleading* could put the matter in any better light, and that the action is really frivolous or vexatious, it may stop the proceedings altogether there and then."

The emphasis is mine and shows that under the rule then in force delivery of a *pleading* was a condition precedent to any application to strike out. It is, of course, otherwise under our rule.

There was, moreover, an affidavit in opposition affirmed to by Mr. R. Rajasingam, counsel for the plaintiffs, being Enclosure 13, which sets out the plaintiffs' entire case and, had there been a statement of claim filed, no doubt it would merely have repeated, albeit, in the third person, what appears in that affidavit. Furthermore, the point was not taken before me and, if it were a good point, I should think, it is too late now for the plaintiffs to raise it, especially as they have filed an affidavit in opposition and argued on the merits of the application: (Order 2, rule 2(1) Rules of the High Court, 1980).

In any event, if there had been an error on the part of the defendant in filing its application prematurely, then I consider, having regard to the circumstances here, it could be readily condoned under the provisions of Order 2, rule 1(1) of the Rules of the High Court.

I would therefore echo and, with respect, adopt what Ismail Khan J. (as he then was) said in *Ee Kim Kin* v. *Collector of Land Revenue, Alor Gajah*:[2]

".....Be that as it may, I incline with respect to the views of Dr. Bashir Mallal (see his *Supreme Court Practice*, Vol. 1, p.724) particularly as in this case, recourse to the most convenient practice commends itself for practical reasons. I do not think that mere technicalities should have such overriding effect as to place an impediment to the proper administration of justice. Rules of procedure should be the hand-maiden not the master, for even if successful, the objection can only have the effect of delaying the decision of issues raised and serve no practical purpose. I therefore disallowed the objection."

I now turn to consider the substantive questions which arise on this application. In order to understand them it will be necessary to amplify my account of the proceedings in the Magistrate's Court Actions and the consequent litigation which arose therefrom.

The suits in the Magistrate's Court Actions were instituted in October, 1978, and brought by the present defendant as plaintiff against the present plaintiffs as defendants, for possession of a number of bays comprised in various godowns, Weld Quay Foreshore, Penang.

According to the Statement of Claims filed in the Magistrate's Court Actions, the present defendant (who was then the holder of a valid and subsisting Temporary Occupation Licence in respect of the land on which the godowns concerned stood) alleged that as owner and landlord of the godowns concerned, it was entitled to possession, on the ground, that the present plaintiffs' contractual tenancies had been determined by notice to quit with effect from August 31, 1978.

According to the defences filed in the Magistrate's Court Actions, and I quote, "the defendants are the tenants of the godown and land at a rental of $324 per month...as long as the plaintiff is able to acquire a T.O.L. and/or the right to remain at the said godown from the State Government of Penang." The notices to quit were, therefore, bad in Law – so it was said.

Clearly, therefore, the present plaintiffs acknowledged the defendant's title.

The first event of importance after the institution of the suits in the Magistrate's Court Actions, was the receipt, in December 1981, by Messrs. Wong Hoong Yin and Company, the then solicitors for the present plaintiffs, of a key letter dated December 14, 1981 from Messrs. Annamalai and Company, the solicitors for the present defendant, being Exhibit "A" ("the letter"), which was in the following terms:

*EXHIBIT "A"*

14th December, 1981.

M/s. Wong Hoong Yin & Co.,
Advocates & Solicitors,
Penang.

Dear Sirs,

*Notice on Demolition of Godowns at No. 121 & 125 Weld Quay, Penang*

We send you herewith a copy of the Notice dated 15.10.81 and 17.11.81 received from the Penang Land Office in respect of the premises Nos. 121 & 125, Weld Quay, Penang occupied by your clients who are all defendants on matters pending before the 1st Magistrate's Court, Penang for you and your clients' attention so that immediate action can be taken in this matter.

The occupants affected are :-

1. M/s. Wan Lee at No. 121, Weld Quay, Penang.
2. M/s. Chop Seng Huat at Nos. 121 & 125, Weld Quay, Penang.
3. M/s. Guan Joo at No. 125, Weld Quay, Penang.
4. Hin & Co., at No. 125, Weld Quay, Penang.
5. M/s. Sin Swee Hin at No. 125, Weld Quay, Penang.
6. M/s. Hua Seng at No. 125, Weld Quay, Penang.

Kindly acknowledge receipt. Thank you.

Yours faithfully,

Sgd: Annamalai & Co.

The two notice dated October 15, 1981 and November 17, 1981 from the Penang Land Office, being Exhibits "B" and "C" ("the two notices") referred to in, and accompanying the letter, were respectively in the following terms:

*EXHIBIT "B"*

*TRANSLATION*

*Letter dated 15 October, 1981 from LAND OFFICE.*

To:
Chee Seng & Co. Ltd.,
183, Victoria Street,
Pulau Pinang.

*ILLEGAL OCCUPATION ON GOVERNMENT'S LAND LOT 199 AND LANDS OF THE GOVERNMENT OPPOSITE LOT 199' P.B. 23, NED, (GODOWN SITES: C8, C10, C11, C12, C13, C14 & B1)*

It has been found that you are still illegally occupying the Government land mentioned and using it as godown/house/temple/coffee shop.

Your action has violated Section 425, National Land Code (Act 56, 1965) and hence you have committed an offence, and will, if convicted, be liable to a fine not exceeding $10,000/-, or imprisonment for a period of not more than a year or both.

As such, you have been given notice to demolish the building mentioned within 7 days from the date of receipt of this notice. If you fail to do so, I will have to take actions under Section 426(A) in the Act mentioned which are as follows:-

426(A) A police officer not below the rank of an Inspector, Registrar, Collector, Settlement Officer or any other officer authorized by the State Authority (hereinafter called 'the Authorized Officer') can without warrant –

(a) arrest any person found committing or trying to commit or under suspicion of committing an offence under section 425 or 426;

(b) seize any vehicle, tractor, farming equipment or any other object that is believed to be used or being used to carry out an offence under that section;

(c) to demolish or shift any building, or take possession in the name of the State Authority any crops cultivated on the land transgressed upon.

Collector of Land Revenue.

*EXHIBIT "C"*

*TRANSLATION*

*Letter dated 17 November, 1981 from LAND OFFICE.*

To:
Chee Seng & Co. Ltd.,
183, Victoria Street,
Pulau Pinang.

*ILLEGAL OCCUPATION ON GOVERNMENT'S LAND LOT 199 AND LANDS OF THE GOVERNMENT OPPOSITE LOT 199 P.B. 23 EAST COAST DISTRICT, PENANG.*

We refer to our letter Ref.(16) dated 15.10.81 on the above subject.

You have not demolished the godown as advised in our notice on the above.

As such, you are advised to demolish the building within the period of notice given, failing which we will have no alternative but to demolish the building without further warning.

Clearly, the plaintiffs' then solicitors, had they bothered to read the letter and the two notices, must surely have inferred that the defendant's Temporary Occupation Licence had expired. It would then have been a relatively simple matter to have obtained the necessary confirmation from the Land Office, Penang, but they did nothing of the sort. Had they done so, no doubt, they would have been informed that the Temporary Occupation Licence concerned had expired on December 31, 1978 and had not since been renewed. In the event, the defences in the Magistrate's Court Actions were not amended to challenge the defendant's title. The significance of this will become apparent later.

It is against the background of the letter and the two notices that one examines the history of the proceedings.

In the first place, pursuant to a formal application by the defendant, as plaintiff in the Magistrate's Court Actions, supported by affidavit, there was recorded on May 12, 1982, (that is to say nearly six months after receipt of the letter and the two notices) by the learned Magistrate, a consent order whereby the plaintiffs (who were the defendants in the Magistrate's Court Actions) were required within one month, to pay and deposit into court the arrears of rental from July 1981 until May 1982 at the rate of $341.25 per month and, thereafter, the monthly rental at the same rate also into court within 7 days of each month until disposal of the action. The counsel who consented on behalf of the present plaintiffs was none other than Mr. Wong Hoong Yin himself, whose firm, of which he was sole proprietor, had earlier received the letter and the two notices.

The affidavit in support of the application aforesaid contained, *inter alia*, the following averment:

"The defendants have filed their Statement of Defence on 7/12/78 and by paragraph 2 they have admitted that they are tenants of the plaintiff of the said godown at a monthly rental of $341.25."

Pursuant to the consent order aforesaid, payments were made into court by the present plaintiffs and payment out to the present defendant duly ordered. The first question which arises is, what is the legal effect of these payments?

Now, it is trite law, that payment of rent by a person in occupation to the person who let him into possession is an acknowledgment by the former of the latter's right to such rent and, therefore, of his title as landlord, which the former is accordingly estopped from disputing: *Cooke* v. *Loxley*,[3] *Cuthbertson* v. *Irving*,[4] *Duke* v. *Ashby*,[5] *Weeks* v. *Birch*.[6]

Indeed, payment of rent pursuant to a consent order is, I should have thought, a more conclusive and unequivocal recognition of the landlord's title than voluntary payment. I derive analogical support for this in the cases of *Panton* v. *Jones*,[7] *Cooper* v. *Blandy*,[8] which are authorities for the proposition that a submission to a distress for rent is a recognition of the distrainor's title as landlord which gives rise to an estoppel.

Be that as it may, on the date fixed for hearing, neither the present plaintiffs nor their counsel was in court but their opponent and its counsel were. In consequence, default judgment for possession was duly entered. This was on September 15, 1982.

Six days later, the present plaintiffs had applied to the Magistrate concerned to set aside the default judgment. However, the application was refused on the ground that no sufficient cause for absence had been shown. From that decision of the learned Magistrate the present plaintiffs appealed to the High Court.

In the meanwhile, on April 9, 1983 by a consent order entered by the learned Magistrate, execution in respect of the possession order was stayed on condition that the present plaintiffs paid into court all double rentals and costs within 90 days and thereafter the remaining double rentals to be paid into court from the first week of each month and every month. The condition was duly complied with.

Again, it was Mr. Wong Hoong Yin who consented on behalf of the present plaintiffs on this occasion.

On appeal before me, the judgment of the Magistrate was attacked on a number of grounds which are not germane to the present application, so I do not propose to refer them.

It is, however, pertinent to mention that during the argument, I asked counsel for the present plaintiffs the particulars of the alleged defence on the merits.

He then responded that his clients "would rely on an oral tenancy agreement allegedly entered into upon expiry of a 'Tenancy Lease Agreement' in writing dated December 1, 1973 for one year." So, up to then, there was no attempt to challenge the present defendant's title. The significance of this observation will also become apparent later.

In the event, on December 4, 1985 I dismissed the appeal from the decision of the learned Magistrate refusing the application to set aside the default judgment, for reasons which appear sufficiently from my judgment reported in *Seng Huat Hang Sdn. Bhd. & Ors.* v. *Chee Seng & Co. Sdn Bhd.*[9]

The plaintiffs were not daunted. They next filed an application in the High Court for leave to commence Certiorari Proceedings to quash the decision not only of the Magistrate's Court but also my decision refusing to set aside the default judgment ("the Certiorari Proceedings").

To put it mildly, this was a somewhat surprising step to take since, it is elementary, that certiorari can only issue to quash the decision of inferior tribunals. Be that as it may, in the application for leave, in the Certiorari Proceedings, the present plaintiffs took the point, for the first time, that the possession orders made in the Magistrate's Court Actions and my order dismissing the appeal therefrom, were null and void on the ground that the present defendant had fraudulently obtained such orders by wilful concealment, from the court, of certain material facts, to wit:

> "(a) That the State Authority had not issued them with a Temporary Occupation Licence since the 31st day of December 1979;
>
> (b) That they represented to the plaintiffs (the defendants in the said actions) that they had title to the land on which the said Godown stood erected and had a right of recovery of possession as claimed by them when it was not so;
>
> (c) That the said land had in fact been alienated to Koperasi Gabungan Negeri since 1983 or thereabouts, and therefore they had no right title or interest therein whatsoever, at any event from such alienation."

In the event, the application for leave in the Certiorari Proceedings was duly heard and dismissed by my brother Datuk Dzaiddin on the ground that it was made out of time. The plaintiffs appealed from that decision and the appeal is, I gather, still pending in the Supreme Court.

Still the plaintiffs were not deterred for they then caused to be issued the Writ of Summons

herein against the defendant for, *inter alia*, orders seeking to have declared as null and void the possession orders made in the Magistrate's Court Actions and my order dismissing the appeal therefrom, on the same grounds urged in support of the application for leave in the Certiorari Proceedings which I have just reproduced.

In considering the application now before me, which as I have said, is to strike out the plaintiffs' Writ of Summons and Indorsement of Claim as being, *inter alia*, frivolous, vexatious and an abuse of the process of the Court, I had kept in the forefront of my mind, the well-settled principle that it is a jurisdiction which ought to be very sparingly exercised and only in very exceptional cases (per Lord Herschell in *Lawrance* v. *Lord Norreys.*[10]) It follows, that an order will be made only in cases when it is obvious that the claim is devoid of all merit or cannot possibly succeed – *Willis* v. *Earl Beauchamp.*[11]

Now "acts of the highest judicial authority," though "not to be impeached from within," yet "are impeachable from without," for "although it is not permitted to shew that the Court was mistaken, it may be shewn that they were misled. Fraud is an extrinsic collateral act; which vitiates the most solemn proceedings of Courts of justice." – per De Gray, C.J. in *Duches of Kingston's Case.*[12] "Fraud" said Lord Buckmaster "is an insidious disease, and if clearly proved to have been used so that it might deceive the court, spreads to infect the whole body of the judgment." – in *Jonesco* v. *Beard.*[13]

On the other hand, in the Australian Case of *Price* v. *Stone,*[14] Gillard, J. pointed out the necessity of proving a deliberate fraud upon the Court as a foundation of this relief, and contrasted this with misleading or erroneous evidence falling short of this requirement.

This last point comes in for emphasis in *Patch* v. *Ward*[15] and in the New Zealand Case of *Giffen* v. *Leggatt.*[16]

In *Patch's* case, Lord Cairns said this at page 207:

".....The fraud there spoken of must clearly, as it seems to me, be actual fraud, such that there is on the part of the person chargeable with it the malus animus, the mala mens putting itself in motion and acting in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him..."

A little further down on the same page, he said this:

".....I apprehend the fraud, therefore, must be fraud which you can explain and define upon the face of a decree, and that mere irregularity, or the insisting upon rights which, upon a due investigation of those rights, might be found to be overstated or overestimated, is not the kind of fraud which will authorize the Court to set aside a solemn decision which has assumed the form of a decree signed and enrolled."

And, at page 212, Rolt, L.J. said this:

"....the fraud must be actual positive fraud, a meditated and *intentional contrivance to keep the parties and the Court* in ignorance of the decree by that contrivance. Mere constructive fraud not originating in actual contrivance, but consisting of acts tending possibly to deceive or mislead without any such intention or contrivance, would probably not be sufficient – ..."

(Emphasis supplied).

In *Giffen's* case, Williams, J. said this at page 430:

"....The Warden (Mr. McCarthy) has decided that there was a duty to make the disclosure; that, even if there was not, the non-disclosure put a wrong complexion on the matter, and would so mislead the Warden before whom the application was made. The Act, however, requires that in order to set aside a title it must appear that the title was obtained by fraudulent misrepresentation, and the simple question is whether upon the facts there was fraudulent misrepresentation. If there was not, then a mere breach of duty by non-representation is not sufficient to set aside a title, even if a duty to represent exists, unless the party obtaining the title actually knew such to be his duty, and wilfully abstained from performing his duty."

It must also appear that the case for the plaintiffs will be a strong case or the claim may be stayed as vexatious: *Birch* v. *Birch.*[17]

The disinclination of the Courts to encourage such actions without a very strong foundation is well illustrated by the judgment of James, L.J. with which Thesiger, L.J. concurred in *Flower* v. *Lloyd,*[18] the following passage being especially relevant:

"....assuming all the alleged falsehood and fraud to have been substantiated, is such a suit as the present sustainable? That question would require very grave consideration indeed before it is answered in the affirmative. Where is litigation to end if a judgment obtained in an action fought out adversely between two litigants sui juris and at arm's length could be set aside by a fresh action on the ground that perjury had been committed in the first action, or that false answers had been given to interrogatories, or a misleading production of documents, or of a machine, or of a process had been given? There are hundreds of actions tried every year in which the evidence is irreconcilably conflicting, and must be on one side or other wilfully and corruptly perjured. In this case, if the plaintiffs had sustained on this appeal the judgment in their favour, the present defendants, in their turn, might bring a fresh action to set that judgment aside on the ground of perjury of the principal witness and subornation of perjury; and so the parties might go on alternately ad infinitum. There is no distinction in principle between the old Common Law action and the old

Chancery suit, and the Court ought to pause long before it establishes a precedent which would or might make in numberless cases judgments supposed to be final only the commencement of a new series of actions. Perjuries, falsehoods, frauds, when detected, must be punished and punished severely; but, in their desire to prevent parties litigant from obtaining any benefit from such foul means the Court must not forget the evils which may arise from opening such new sources of litigation, amongst such evils not the least being that it would be certain to multiply indefinitely the mass of those very perjuries, falsehoods, and frauds."

Also of importance is the fact that the plaintiff must always explain why the matters alleged could not have been brought forward in the original proceedings. In *Birch* v. *Birch* (*supra*) it was held that there must be a suggestion in the statement of claim, *if it is to escape being struck out as being frivolous and vexatious*, of such facts, *only discovered since the trial*, as if proved, would render it reasonably probable that the judgment would be upset, though the facts suggested need not necessarily be such as would have been evidence at the trial per Vaughan Williams, L.J. at pages 136, 137. (Emphasis added).

Similarly, in Victoria, M.C. in *Mcharg* v. *Woods Radio Pty. Ltd.*,[19] Herring, C.J. struck out a statement of claim where it alleged that the defendant had obtained the judgment by perjured evidence but there was no allegation of any new discovery or of fresh facts.

His Lordship described the nature of the action in the following terms:

"....Such an action is an independent proceeding, equitable in its origin and nature. In it the fraud complained of is put in issue and that fraud only. And as in all other actions based on fraud, particulars of the fraud must be exactly given and the allegation established by the strict proof that such a charge requires.

'In considering actions of this kind the Courts have naturally been pressed by the necessity in the public interest of putting some limit to litigation. And they have refused to allow such actions to proceed, unless satisfied that there was a reasonable probability of the fraud alleged being established. *Thus when an application is made to stay proceedings, the burden is not on the defendant, as in an ordinary action, to show that the action is frivolous or vexatious or some other reason for staying it. The very fact that what the plaintiff seeks is to set aside a judgment binding upon him, is sufficient to place the onus upon him of showing that he has reasonable prospects of success. And to satisfy this onus the plaintiff must produce evidence of facts discovered since the judgment complained of, which raise a reasonable probability of the action succeeding.*' "

(Emphasis added).

The authorities referred to above fully support the following proposition by Mr. Turner in his thorough and erudite work on *Actionable Misrepresentation*, 3rd Edition at page 369 footnote 4 which reads:

"In the nature of the case, the number of successful actions for this purpose must be few, as compared with the number of those which fail, owing to the firm recognition by the courts of the interest of the community ut sit finis litium, and the strict burden of proof which is accordingly required of the plaintiff, – proof not merely of the fraudulent misrepresentation, but of the fact that it could not have been discovered and exposed at the trial."

Having regard to the authorities cited above, it seemed to me, that two further questions arose for decision. I would state them thus:

1. Was there *any* evidence of deliberate fraud on the part of the present defendant, as alleged or at all?

2. If so, could it have been discovered and exposed either in the Magistrate's Court Actions or, at the hearing of the application to set aside the default judgment or, on the appeal before me from the refusal of the learned Magistrate to do so?

Taking the first question first, counsel for the plaintiffs' basic contention was that fraud on the defendant's part consisted of wilful concealment from the court of the fact that its Temporary Occupation Licence, in respect of the land on which the godown stood, and which was the subject of the possession order, had expired on December 31, 1978 and had not since been renewed.

As a result, it was said, that the defendant had falsely represented to the court, that it had title to the land concerned and, consequently, a right to recover possession.

Clearly, there cannot be wilful concealment amounting to fraud unless there was in the first place a duty imposed by law upon the party concerned to make the disclosure alleged.

In my review of the background to these proceedings, I referred to and reproduced the key letter and the two notices sent by the present defendant's solicitors to the present plaintiffs' then solicitors which, it will be recalled, were duly received by the present plaintiffs' then solicitors, Messrs. Wong Hoong Yin and Company in December 1981. The same firm of solicitors represented the present plaintiffs in the Magistrate's

Court Actions and in the subsequent appeal before me.

I have already observed that the letter and the two notices made it clear that the present defendant's Temporary Occupation Licence had expired or, at the very least, should have put the plaintiffs on enquiry that this was so.

Yet, the present plaintiffs' then solicitors took no step whatsoever to write to the Land Office for confirmation as to the date of its expiry. Had they done so, no doubt, they would have been informed that it had expired on December 31, 1978 and had not since been renewed. What were the reasons for this inaction?

None was vouchsafed to this court, although during the argument counsel for the plaintiffs was queried by me on this very point.

In my opinion, the letter and the two notices which were received by the present plaintiffs' then solicitors, well before the hearing of the Magistrate's Court Actions, puts paid to the argument that the present defendant was guilty of a *deliberate fraud* as alleged or at all. Although they were armed with the facts appearing in the letter and the two notices, the plaintiffs did nothing to verify their contents or to amend their defence to challenge the present defendant's title to sue.

In these circumstances, was it the duty of the defendant's counsel to conduct not only his own case but also that of his opponent in the Magistrate's Court Actions by putting forward a plea of want of title? I am confident that the answer to this question must be in the negative. If I am correct in this, then he was under no duty to make the disclosure and so there could be no question of wilful concealment as alleged or at all.

Alternatively, even if there were such a duty, having regard to the contents of the key letter and the two notices, the failure on the part of the defendant to disclose its want of title in the Magistrate's Court Actions may, at most, have been misleading or even erroneous but it falls far short of the requirements of deliberate fraud within the meaning of *Patch* v. *Ward*, *Giffen* v. *Leggatt*, *Price* v. *Stone*, and *Birch* v. *Birch* (*supra*).

It follows, therefore, that far from there being a strong case, there was not an iota of evidence of fraud on the part of the present defendant as alleged or at all. I would, therefore, answer the first question posed above in the negative.

In case I am wrong in answering the first question as I have done, I propose to set out both my conclusion and my reasons with regard to the second question.

I have already stressed that the plaintiffs' then solicitors (who, I repeat, were also the solicitors who represented them in the Magistrate's Court Actions) must, upon receipt of the key letter and the two accompanying notices in December 1981 have known or at the least, have had notice of facts which should have warned them, that the defendant's Temporary Occupation Licence had expired. This was long before the default judgment was entered on September 15, 1982. Yet, they did not bestir themselves by amending their defences in the Magistrate's Court Actions to challenge their opponent's title.

Similarly, in the application to set aside the default judgments in the Magistrate's Court Actions and, in the subsequent appeal therefrom to the High Court, they also did nothing of the sort. It was only in the application for leave in the Certiorari Proceedings, commenced on September 11, 1985 that the present plaintiffs, for the first time, challenged the defendant's title.

In these circumstances, if contrary to my primary conclusion, there was fraud on the part of the present defendant, as alleged, then fraud was discoverable and could have been exposed by the present plaintiffs in the Magistrate's Court Actions. It is true that there were in this case only default judgments. I am aware that in the Privy Council case of *Kok Hoong* v. *Leong Cheong Kweng Mines Ltd.*,[20] Viscount Radcliffe delivering the advice of the Board said at page 53, column 1, paragraphs E and F:

> "....this reinterpretation amounts to saying that default judgments, though capable of giving rise to estoppels, must always be scrutinised with extreme particularity for the purpose of ascertaining the bare essence of what they must necessarily have decided and, to use the words of Lord Maugham, L.C. ([1939] A.C. at p.21), they can estop only for what must 'necessarily and with complete precision' have been thereby determined."

But, in this case, defences had been filed and the defaults were of appearance at the trial. In *Ker* v. *Williams*[21] the dismissal of an action on default of appearance at the trial was held to be a "judgment" which "operated as an estoppel to the plaintiff" – per Lindley L.J.

Moreover, there was the consent order of May 12, 1982 and there were also the subsequent

proceedings to set aside the default judgments both here and in the Court below, yet the plaintiffs studiously refrained from challenging the defendant's title. I therefore did not consider that the plaintiffs had discharged the strict burden of showing, to quote Mr. Turner's work, not only "fraudulent misrepresentation but of the fact that it could not have been discovered or exposed at the trial." I would therefore answer the second question in the affirmative.

On a further ground also the plaintiffs' present action was barred by estoppel in view of my finding that long before the default judgments were entered the plaintiffs knew or at the least, had notice of facts which should have warned them that the defendant's Temporary Occupation Licence had expired and had not been renewed. The question arises whether it was open to the plaintiffs in the Magistrate's Court Actions to have pleaded the defendant's want of title? Clearly, it was and had they done so, they could have applied for a transfer of the suits to the High Court for trial there for jurisdiction reasons. But the plaintiffs did nothing of the sort.

Indeed, as I have noted, pursuant to a consent order made in the Magistrate's Court Actions on May 12, 1982 rentals were deposited in Court which were subsequently ordered to be paid out to the defendant. And, by a further consent order dated April 9, 1983, double rents and costs were paid into court by the plaintiffs.

It will also be recalled, that on the appeal before me on the refusal of the Magistrate to set aside the default judgments, counsel for the plaintiffs amplified the defence filed by saying in answer to the court that his clients would rely on an oral tenancy agreement entered into upon expiry of a 'Tenancy Lease Agreement' in writing dated December 1, 1973 for one year. So, even up to that late stage, the defendant's title was not disputed. I have already said that it was only in the subsequent Certiorari Proceedings that the point was taken for the first time.

Now, a party cannot, in a subsequent action, raise a ground of claim or defence which, upon the pleadings, was open to him in the former one. Thus, in an action for arrears of rent, where a defendant unsuccessfully pleaded no concluded agreement, he was prevented in a subsequent action for further arrears of rent, from setting up the further defence under the Statute of Fraud of no memorandum in writing: *Humphries* v. *Humphries*.[22]

It is also an abuse of the process of the court to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings – *Yat Tung Investment Co. Ltd.* v. *Dao Heng Bank Ltd.*[23]

It is my judgment, therefore, that on this further ground also, the plaintiffs are bound by their pleadings in the Magistrate's Court Actions and are thereby estopped from taking the point raised in the action herein.

The remaining issues which arose in this application may be disposed of shortly. The cases of *Fatimah* v. *Moideen Kutty*[24] and *National Westminster Bank Ltd.* v. *Hart*[25] which were strongly relied on by counsel for the plaintiffs are really of no direct relevance to the questions raised in this judgment because in neither of those cases did any question of estoppel arise. In those cases, unlike this case, the claimant's title was challenged right from the start.

Accordingly, I find it unnecessary to discuss the judgment of Lord Denning, M.R. in *Industrial Properties* v. *Aei Ltd.*[26] particularly, his interesting proposition, supported by authority that:

> "....if the landlord, on the tenant's holding over, sues him for possession or for use and occupation or mesne profits, the tenant cannot defend himself by saying: 'The property does not belong to you, but to another.' But if the tenant is disturbed by being evicted by title paramount or the equivalent of it, then he can dispute the landlord's title."

However, I note that in the *National Westminster Bank's* case (*supra*), Waller L.J. said at page 181, paragraph E:

> "....there can be not estoppel unless the tenant knows the fact or *he has had notice which should have warned him*."

and, a little further down, at paragraph G, his Lordship added:

> "....Finally, in the case of the landlord whose title has determined *and who has not informed the tenant*, 'it is clear law that though a tenant cannot deny the title of his landlord to deal with the premises he may prove the title has determined.' " (The emphasis is mine).

In the instant case, as I have repeatedly stressed, at all material times, the plaintiffs knew or had notice of facts which should have warned them that the defendant's Temporary Occupation Licence had expired and not been renewed; the necessary information having been provided by the defendant's solicitors to the plaintiffs' then solicitors by the key letter and the two accompanying notices.

In the result, applying the test laid down in *Willis* v. *Earl Beauchamp* (*supra*), I was thoroughly convinced that the plaintiffs' claim was devoid of merit and also that it could not possibly succeed. It follows that if the test laid down in *Mcharg* v. *Woods Radio Pty. Ltd.* (*supra*) which places the onus on the plaintiffs to show that they have a reasonable prospect of success, were applied, then the case for the defendant in this application would be even stronger. In the exercise of my discretion, I therefore made an order in terms of the defendant's application and awarded costs in its favour.

*Order accordingly.*

Solicitors: *R. Rajasingam & Co.; Annamalai & Co.*

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## KOAY TUAN & ANOR. v. ENG CHONG HOW & ANOR.

**[O.C.J. (Edgar Joseph Jr. J.) March 21 & 28, 1986]**

**[Penang – Civil Suit No. 429 of 1977]**

*Employment – Meaning of "a similar benefit admissible under the provisions of any other written law" – Whether award of damages under ss. 7 & 8 of Civil Law Act, 1956 "a similar benefit" – Civil Law Act, 1956, ss. 7 & 8 – Employee's Social Security Act, 1969, s. 42.*

*Damages – Whether award of damages under ss. 7 & 8 of Civil Law Act 1956 "a similar benefit".*

The plaintiffs are the administratrix and administrator of the Estate of one Teh Keat Leng, deceased, who worked as a supervisor for Seng Hing Sawmill. On December 20, 1974 at about 3.00 pm the deceased was killed by the timber load which was to be unloaded. The lorry which carried the timber was owned by the second defendants, Lim Chin Joo trading as Chin Joo Sawmill and driven by the first defendant as the servant and/or agent of the second defendant. As the deceased was insured under SOCSO by his employer, Seng Hing Sawmill, the first plaintiff who is the widow of the deceased has been and still is receiving "dependants' benefit" under section 26 of the Employees' Social Security Act, 1969, from December 21, 1974 and thereafter. The plaintiffs have pursuant to the provisions of sections 7 and 8 of the Civil Law Act, 1956 brought this suit claiming damages for the dependants of the deceased as well as on behalf of the estate of the deceased, against the first defendant as driver of the lorry and the second defendant as his employer.

The two questions of law were raised:
(a) whether an award of general damages for loss of support recoverable by the defendants of a deceased under section 7 of the Civil Law Act, 1956, from a party who was neither his employer nor his co-worker amounts to "a similar benefit admissible under the provisions of any other written law "within the meaning of section 42 of the Employees' Social Security Act, 1969 (hereinafter called "the Act");
(b) if so, whether an award of general damages for loss of expectation of life recoverable by the estate of a deceased person under section 8 of the Civil Law Act, 1956, from a party who was neither his employer nor his co-worker, amounts to "similar benefit admissible under the provisions of any other written law" within the meaning of section 42 of the Act.

**Held**: (1) an award of general damages in respect of a dependency claim under section 7 of the Civil Law Act, 1956, being intended to compensate *the dependants* of the deceased in respect of *loss of support* is similar to "dependants' benefit" within the meaning of section 15(1) (c) of the Act. Accordingly, the bar imposed by section 42 of the Act is available to the defendants insofar as the claim for loss of dependency under section 7 of the Civil Law Act, 1956, is concerned;

(2) an award of general damages under section 8 of the Civil Law Act, 1956, is not a similar benefit within the meaning of section 42 of the Act. Accordingly, the bar imposed by section 42 of the Act is not available to the defendants insofar as the claim for loss of expectation of life under section 8 of the Civil Law Act, 1956, is concerned.

*Cases referred to:*

(1) *Chin Choy & Ors.* v. *Collector of Stamp Duties* [1979] 1 M.L.J. 69.
(2) *Walsh* v. *Secretary of State for India* (1863) 10 H.L. Cas. 367; 11 E.R. 1068.
(3) *Hough* v. *Windus* (1884) 12 Q.B.D. 224.
(4) *David* v. *De Silva* [1934] A.C. 106.
(5) *O'Connor* v. *Isaacs* [1956] 2 Q.B. 288.
(6) *Tan Peng Loh* v. *Lee Aik Fong & Anor.* [1982] 1 M.L.J. 74.
(7) *Che Noh bin Yacob* v. *Seng Hin Rubber (M) Sdn. Bhd.* [1982] 1 M.L.J. 80.
(8) *Jewish Blind Society* v. *Henning* [1961] 1 All E.R. 47.
(9) *Walker* v. *Wood* [1962] 3 All E.R. 188, 190.

CIVIL SUIT.

*S. Asamaley* for the plaintiffs.

*R. J. Manecksha* for the defendants.

*Cur. Adv. Vult.*

**Edgar Joseph Jr. J.**: In this case, the two questions of law of critical substance, which arise for decision, are not only novel but also of general importance and may be stated thus:

(a) Whether an award of general damages for loss of support recoverable by the dependants of a deceased under section 7 of the Civil Law Act, 1956, from a party who was neither his employer nor his co-workers, amounts to "a similar benefit